

KERAJAAN MALAYSIA v. CARDIGAN GUARDS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: 12ANVC-16-01-2014]
19 MAY 2014

CONTRACT: *Terms – Construction – Contract for security guard services – Clause in contract – Whether payment could be deducted for absent guard – Whether clause void and contravened s. 75 of the Contracts Act 1950*

By a contract dated 5 August 2010 ('the contract') the Government of Malaysia ('the appellant') appointed the respondent to provide security guards services at the rate of RM4.30 per hour for a period of two years commencing from 1 June 2010 to 1 June 2012 at the total contract price of RM1,107,439. Clause 4.2(d) of the contract permitted the appellant to deduct RM8.60 an hour for absentee guards from the payments due to the respondent. Based on the records of attendance book, the appellant deducted a sum of RM149,672.68 from the payments due to the plaintiff. Unsatisfied, the respondent commenced an action and sought, *inter alia*, for a refund of the monies deducted and a declaration that cl. 4.2(d) of the contract was invalid, unenforceable, and in breach of s. 75 of the Contracts Act 1950 ('CA'). The Sessions Court Judge allowed the respondent's claim and declared the clause in the contract void. Hence the appeal.

Held (allowing appeal):

- (1) Section 75 of the CA merely declared the law that notwithstanding any fixed sum stipulated in the contract to be payable in case of breach, the court would award the innocent party only reasonable compensation not exceeding the amount stipulated in the contract. The fixed sum in a contract could not be awarded unless the court was satisfied that it was a genuine pre-estimate and reasonable compensation for the loss and damage suffered by the innocent party. Where the extent of the actual loss or damage suffered by the innocent party was incapable of proof s. 75 of the CA made it permissible for the party to claim the fixed sum if he could satisfy the court that it was a genuine pre-estimate and reasonable compensation. (para. 14)
- (2) Clause 4.2(d) of the contract did not become null and void for breach of s. 75 of the CA because it provided that the defendant could deduct a sum of RM8.60 an hour for absentee guards from the payments due to the plaintiff. It could not be gainsaid that it would be difficult to assess the loss and damage suffered by the defendant when plaintiff's security guards failed to report for duty at the hospital. The defendant would have inevitably faced hardship in finding replacement guards. In the circumstances, the question of whether the contract between the plaintiff and the defendant came within the category of cases where the extent of

- A the loss suffered by the defendant was incapable of assessment; and if so, whether the agreed rate of RM8.60 was a genuine pre-estimate and was reasonable compensation for the loss and damage suffered by the defendant, could only be determined after the adduction of evidence at the trial. Therefore, it was wrong for the Sessions Judge to have declared
- B the clause null and void *per se* without hearing evidence from the parties on these issues. (paras. 15 & 16)

Case(s) referred to:

- Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169 HC (*refd*)
- C *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569 FC (*foli*)
Lebby Sdn Bhd v. Tan Keng Hong & Anor [2000] 1 AMR 15 HC (*refd*)
Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC (*refd*)
Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd AIR 2629 [2003] SC (*refd*)
Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong [1996] 2 CLJ 960 CA (*refd*)
- D *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 FC (*foli*)
SS Maniam v. The State of Perak [1956] 1 LNS 112 HC (*refd*)
Sykt Ong Yoke Lin Sdn Bhd v. Giant Cash & Carry Sdn Bhd & Ors [2000] 4 CLJ 733 HC (*refd*)
Yap Yew Cheong & Anor v. Dirga Niaga (Selangor) Sdn Bhd [2005] 7 CLJ 250 HC (*refd*)

Legislation referred to:

- E Contracts Act 1950, s. 75
Rules of Court 2012, O. 14A
- For the respondent - CJ Siew (Jeanette Tan with him); M/s Douglas Yee*
For the appellant - Fazilah Mansor; FC
- F *Reported by Sandra Gabriel*

JUDGMENT

SM Komathy Suppiah JC:

- G [1] This is an appeal by the defendant, the Government of Malaysia, against the decision of the Kuala Lumpur Sessions Court Judge given on 22 November 2013 declaring cl. 4.2(d) in a contract entered between it and the plaintiff, null and void for breach of s. 75 of the Contracts Act 1950. The application was made by the plaintiff pursuant to O. 14A of the Rules of
- H Court 2012 (“ROC”).

Brief Facts

- I [2] The factual matrix to this case is as follows. By a contract No. KKM (KS-Kulim) 73/2010 dated 5 August 2010 (“the contract”) made between the defendant and the plaintiff, the defendant appointed the plaintiff to provide security guards services (“guard services”) for Hospital Kulim at the rate of RM4.30 per hour for an unarmed guard for a period of two years commencing from 1 June 2010 to 1 June 2012 at the total contract price of

RM1,107,439 (inclusive of 5% service tax of RM52,735.20) subject to the terms and conditions contained therein. It was an express term of the contract that the plaintiff was to provide guard services 24 hours a day divided into three shifts, and 14 guards for every shift.

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[3] Clause 4.2(d) of the contract permitted the defendant to deduct RM8.60 an hour for absentee guards from the payments due to the plaintiff for services rendered. It reads:

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Dalam keadaan Syarikat tidak dapat menyediakan atau menempatkan bilangan pengawal yang telah ditetapkan atau kegagalan pengawal menghadirkan diri semasa bertugas maka Kerajaan boleh memotong Ringgit Malaysia: Lapan Ringgit Enam Puluh Sen Sahaja (RM8.60) bagi tanpa senjata setiap satu jam atau sebahagian darinya bagi satu orang.

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[4] Based on the records of attendance book maintained at the said hospital, the defendant acting under the aforesaid clause had deducted a sum of RM149,672.68 from the payments due to the plaintiff.

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[5] On 21 May 2013, the plaintiff commenced the present action seeking, *inter alia*, for a declaration that upon a true construction of cl. 4.2(d), it was invalid and unenforceable as it was a penalty and was in breach of s. 75 of the Contracts Act 1950 ("Contracts Act"). It therefore sought the refund of the monies deducted pursuant to the said clause. In its defence, the defendant disputed the position taken by the plaintiff and maintained that the clause was valid and enforceable.

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[6] The plaintiff then filed the present application under O. 14A of the ROC seeking the determination of the validity of cl. 4.2(d) as a preliminary issue. The question of law/construction sought was whether on a true and proper construction of cl. 4.2(d), it was unlawful and/or unenforceable for contravention of s. 75 of the Contracts Act 1950. If the answer was in the affirmative, whether the deduction of the RM149,672.68 by the defendant from the payments due to the plaintiff was unlawful.

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The Law

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[7] Section 75 of the Contracts Act 1950 stipulates:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

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[8] Section 75 of the Contracts Act 1950 has been the subject of numerous judicial pronouncements. The scope and meaning of this provision has been considered in several leading decisions, including *SS Maniam v. The State of Perak* [1956] 1 LNS 112; [1957] 1 MLJ 75, *Linggi Plantations Ltd v.*

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- A *Jagatheesan* [1971] 1 LNS 66; [1972] 1 MLJ 89 (PC), *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 (FC), [1995] 1 MLJ 817, *Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong* [1996] 2 CLJ 960; [1996] 2 MLJ 543 (CA) and *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569.
- B [9] In *Linggi Plantations (supra)*, Lord Hailsham in explaining the scope of s. 74 of the Indian Contract Act 1872 (which is in *pari materia* with s. 75 of the Malaysian Contracts Act 1950) stated (at p. 92):
- C Section 74 was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the equitable rule to all cases whether the sum provided in the contract was in substance a penalty or a genuine pre-estimate of the damage likely to be suffered.
- [10] In *Selva Kumar (supra)*, the Federal Court explained (at p. 384 (CLJ); p. 827 (MLJ)):
- D But what is far more interesting in that case is that the Indian Supreme Court, when referring to the words in question, ie ‘whether or not actual loss or damage was proved to have been caused thereby’ stated that the words in question were intended to cover two kinds of contracts. In the first kind, the court would find it very difficult to assess such reasonable compensation. In the second kind, the court could assess such reasonable compensation with settled rules. Such dichotomy of contracts by the Indian Supreme Court represents, in our view, a logical basis for the words in question, words added by the legislature to the section in question without seemingly any thoughtfulness about the desirability of some appropriate limitations thereto. We agree with the Indian Supreme Court’s dichotomy of such contracts.
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- G Secondly, we therefore further hold that the words in question, *viz* ‘whether or not actual damage was proved to have been caused thereby’, are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss, as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.
- [11] In *Reliance Shipping (supra)*, Siti Norma Yaakob JCA, in delivering the judgment of the Court of Appeal, referred to *Selva Kumar* and said (at p. 964 (CLJ); p. 547 (MLJ)):
- H In *Wearne Bros (M) Ltd v Jackson* [1966] 2 MLJ 155, the same principles of law were adopted, when Abdul Aziz J held that a clause in an agreement falling within s. 75 must be subject to the court’s determination that such agreed damages is reasonable compensation for the injured party.
- I The recent judgment of the Federal Court in *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 1 MLJ 817, gives a complete picture of how s. 75 is to be interpreted and after going through all the authorities including those cited above, Peh Swee Chin FCJ concluded that the qualifying words in s. 75 ‘whether or not actual damage or loss is proved

to have been caused thereby' are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss as opposed to all other cases, where a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.

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[12] The Federal Court in *Johor Coastal (supra)*, was asked to reconsider its decision in *Selva Kumar*. There, the appellant relied on a decision of the Indian Supreme Court in *Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd* AIR [2003] SC 2629 to contend that in cases falling within s. 75, the innocent or aggrieved party is not required to prove actual loss or damage before he can claim as compensation the sum stipulated in the contract. In rejecting the argument, Arifin Zakaria CJ (Malaya) (as he then was) said (at para. 35 p. 586):

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Upon a close examination, I find that *Oil & Natural Gas* falls in the category of cases where the loss suffered is incapable of assessment. Hence the amount stipulated may be regarded as a genuine pre-estimate of damages and therefore it is recoverable. Further in *Selva Kumar* itself the court recognised that where the court finds it difficult to assess damages as there is no known measure of damages employable, the stipulated sum may be recoverable.

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[13] It is apposite to mention here that there are judicial *dicta* that hold that s. 75 should not be limited to cases where damages are difficult to assess. The decision in *Selva Kumar* was not followed in *Lebby Sdn Bhd v. Tan Keng Hong & Anor* [2000] 1 AMR 15 (HC), *Yap Yew Cheong & Anor v. Dirga Niaga (Selangor) Sdn Bhd* [2005] 7 CLJ 250; [2005] 7 MLJ 660 (HC), *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169; [1998] 6 MLJ 136 (HC) and *Sykt Ong Yoke Lin Sdn Bhd v. Giant Cash & Carry Sdn Bhd & Ors* [2000] 4 AMR 4982; [2000] 4 CLJ 733 (HC). This court is bound by the statement of law enunciated by the Federal Court in *Selva Kumar* and *Johor Coastal* on the meaning of s. 75.

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[14] From the authorities discussed above, the following principles may be extracted:

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- (i) Section 75 merely declares the law that notwithstanding any fixed sum stipulated in the contract to be payable in case of breach, the court will award the innocent party only reasonable compensation not exceeding the amount stipulated in the contract;
- (ii) The stipulated sum acts as a ceiling to the maximum limit that can be awarded as compensation;
- (iii) The fixed sum in a contract cannot be awarded unless the court is satisfied that it is a genuine pre-estimate and reasonable compensation for the loss and damage suffered by the innocent party;
- (iv) A party who has not suffered any loss or damage cannot claim compensation *simpliciter* under this section; and

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- A (v) In cases where the extent of the actual loss or damage suffered by the innocent party is incapable of proof or cannot be proved, s. 75 makes it permissible for the party to claim the fixed sum if he can satisfy the court that it is a genuine pre-estimate and reasonable compensation.

- B [15] Applying the above principles to the present case, it is clear that cl. 4.2(d) does not become null and void for breach of s. 75 of the Contracts Act 1950 merely because it provides that the defendant can deduct a sum of RM8.60 an hour for absentee guards from the payments due to the plaintiff. It cannot be gainsaid that in the present instance, it would be difficult to assess the loss and damage suffered by the defendant when plaintiff's security guards failed to report for duty at the hospital. The defendant would inevitably have faced hardship in finding replacement guards. In the circumstances, the question of whether the contract between the plaintiff and the defendant came within the category of cases where the extent of the loss suffered by the defendant was incapable of assessment; and if so, whether the agreed rate of RM8.60 was a genuine pre-estimate and is reasonable compensation for the loss and damage suffered by the defendant, in my judgment, can only be determined after the adduction of evidence at the trial.
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- E [16] In the circumstance, in my view, it was wrong for the Sessions Court Judge to have declared the clause null and void *per se* without hearing evidence from the parties on these issues.

Conclusion

- F [17] For these reasons, I allowed the appeal. I further ordered that the costs of appeal to follow the event in the Sessions Court.

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